NO. 79529-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JACK OLTMAN, BERNICE OLTMAN, and SUSAN OLTMAN

Appellants/Petitioners

v.

HOLLAND AMERICA LINE-USA INC., a Delaware Corporation, and HOLLAND AMERICA LINE INC., a Washington Corporation,

Defendants/Respondents.

HOLLAND AMERICA LINE INC.'S RESPONSE TO AMICUS BRIEF OF WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION

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I. RESPONSE

Respondents Holland America-Line USA Inc. and Holland America Line Inc. ("Holland America") submit this brief in answer to the amicus brief of the Washington State Trial Lawyers Association Foundation ("WSTLA") pursuant to RAP 10.2(g).

A. Asserting an Affirmative Defense in an initial Responsive Pleading 27 Days After Service of a Complaint is Not Dilatory and Does Not Automatically Waive that Defense

WSTLA contends that Holland America waived its right to contest improper venue because its response to the complaint was filed and served eleven days late,[1] which prejudiced the Oltmans by depriving them of an "opportunity to cure a correctible deficiency." *See* WSTLA Br. at 12 & n.6. (It was actually 7 days. *See* footnote 1). The fatal flaw pervading WSTLA's argument is that it is contrary to existing authority and requires an unprecedented interpretation of CR 12 that neither this Court nor any other court has ever adopted.

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[1] For the Court's convenience, a chronology of pertinent dates is set forth below:

March 31, 2004:	Cruise departs Santiago, Chile	(CP 39-40)
April 17, 2004:	Cruise arrives at San Diego, CA	(CP 39-40)
March 30, 2005:	Complaint filed in King County Superior Court	(CP 1)
April 1, 2005:	Complaint served on Holland America	(CP 24)
April 17, 2005:	Last day to timely file complaint	(CP 111)
April 22, 2005:	Twenty days after service of complaint	(CP 24)
April 29, 2005:	Answer filed and served (via e-mail)	(CP 25, 32)
May 2, 2005:	Answer served (via hand delivery)	(CP 57)
August 12, 2005:	Summary Judgment Hearing in King County	(CP 152)
August 12, 2005:	Trial Court's Order Dismissing the Oltmans' Suit	(CP 495)
August 12, 2005:	Complaint filed in federal Court	(Judicial Notice)

1. WSTLA Cites No Authority on Point to Support Its Waiver of Defenses Argument

Lacking authority, WSTLA extrapolates the principles from Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000), and stretches them to apply to the present case. Lybbert, however, is both distinguishable and inapplicable. There, plaintiffs incorrectly served a personal injury action on Grant County. Id. at 32-33. For nine months following service of the complaint, the county engaged in discovery and mediation discussions, never once challenging the sufficiency of the service of process. Id. Only after 295 days passed and after the statute of limitation expired did the county raise, for the first time, its insufficient service of process defense. Id. The trial court granted the county's motion for summary judgment dismissal. The Court of Appeals reversed, holding that the county, by its actions and inactions, had waived its defense. Id. at 34. This Court accepted review and affirmed the Court of Appeals ruling that the county laid in wait, engaged in discovery unrelated to the defense, and asserted the defense after the time had expired for the plaintiffs to pursue their cause of action. Id. at 44-45.

Unlike Grant County, Holland America did not engage in any discovery, did not participate in any settlement negotiations, and did not

lay in wait for 295 days before raising its improper venue defense. Rather, Holland America raised its affirmative defenses, including improper venue, in its very first responsive pleading.[2] The inconsistent and misleading or waiver behavior that concerned this Court in Lybbert is totally absent in this case.

As this Court pointed out in Lybbert, a short delay in filing an answer and asserting affirmative defenses, without more, is insufficient to waive those defenses. Id. at 44 ("'[M]ere delay in filing an answer does not constitute a waiver of an [affirmative defense].'") (quoting French v. Gabriel, 116 Wn.2d 584, 593-94, 806 P.2d 1234 (1991) (in turn quoting French v. Gabriel, 57 Wn. App. 217, 222, 788 P.2d 569 (1990)).

Ignored by WSTLA, this Court's holding in King v. Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (2002), resolves WSTLA's dilatory conduct argument in favor of Holland America. In King, plaintiffs filed an action against Snohomish County on September 29, 1995. Id. at 423. Nearly one month later, on October 24, 1995, the county answered the complaint and asserted several affirmative defenses, including an administrative claim filing defense. Id. On review, this Court announced: "[T]he claim filing defense was first raised in the County's answer. **The**

[2] WSTLA acknowledges, as dictated by the facts here, that Holland America did not waive its improper venue defense by engaging in inconsistent or misleading behavior. *See* WSTLA Br. at 11.

County was therefore not dilatory in first asserting the claim filing defense and this ground for finding waiver is not met."[3] Id. at 424 (emphasis added). Logic dictates that if filing an answer (the first responsive filing) 25 days after service does not constitute dilatory conduct, filing one within 27 days should likewise be deemed timely.

Other courts have also considered and rejected the argument, advanced by WSTLA, that an untimely answer automatically waives the defense of improper venue. *See, e.g.*, Breland v. ATC Vancom, Inc., 212 F.R.D. 475, 477 (E.D. Pa 2002) (explaining that FRCP 12 "mandates waiver if the defense is not made by motion or included in the first responsive pleading"); Kampf v. Heinecke, 1995 WL 262526 at *1 (E.D. Pa. 1995) (holding that "[i]n light of Plaintiffs' failure to move for default before Defendants filed the instant motion, Defendants' objections grounded on the lack of personal jurisdiction and improper venue are deemed timely"); Gordon v. Strictland, 1993 WL 386765 at *2 n.3 (E.D. Pa. 1993) (holding "unless a plaintiff has made a motion for default, a defendant's motion to dismiss for improper venue after the 20 day period is timely if the defendant has not yet responded"); Elias v. Energy Reduction Sys., Inc., 1993 WL 55932 at *3 (E.D. Pa. 1993) (holding under a FRCP 12 motion "tardiness does not constitute a waiver so long as

[3] This Court ultimately held that Snohomish County waived its claim filing defense, based on inconsistent or misleading behavior. 146 Wn.2d at 424.

defendant's first response raises the issue"); Aetna Life Ins. Co. v. Alla Med. Servs., Inc., 855 F.2d 1470, 1474 (9th Cir. 1988) (noting that the Ninth Circuit "allows a motion under 12(b) any time before the responsive pleading is filed"); Foss v. Klapka, 95 F.R.D. 521, 522 (D.C. Pa. 1982) ("The question presented to the Court is whether a defendant who asserts a defense . . . in his first response to a complaint waives that defense if this response is not filed within 20 days after service of the complaint. **The Court holds that such tardiness does not constitute waiver so long as defendant's first response raises the [defense].**") (emphasis added).[4]

2. Because It Is Undisputed That Plaintiffs Would Have Been Time Barred in the Proper Forum Before Holland America's Answer Was Even Due, There Can be No Prejudice As a Matter of Law

WSTLA's claim that Holland America's untimely answer and improper venue defense in some way prejudiced the Oltmans is simply unsupported. As an initial matter, Holland America was not required to file an answer *at all* prior to filing its dismissal motion on improper venue. *See* CR 12(b)(3). The civil rule plainly permits a number of CR 12(b) dismissal motions including improper venue without any prior notice of the affirmative defense by way of an answer to a plaintiff.

[4] The unpublished cases above are cited under GR 14.1(b). Copies are appended hereto.

As a second matter, if Holland America had filed its answer anytime within the last five days of the 20-day period provided by CR 12, the Oltmans would still have been time-barred from filing their claims in the proper forum. The time line is both instructive and dispositive:

1. The one year contractual time bar to sue on the Oltmans' claims expired, at the latest, on April 17, 2005 (one year from the final day of the cruise, April 17, 2004). (CP 39-40, 111.)

2. Holland America was served with the Complaint on April 1, 2005. (CP 24.)

3. The 20th day to answer provided by CR 12 was April 22, 2005.

4. Between April 18 and April 22, 2005, Holland America's answer would have been timely filed within the 20 day rule period and yet the Oltmans' claims would still have been time-barred in the proper forum.

5. Once April 18th dawned, a year had passed and the Oltmans lost all claims because of the failure to read their ticket. The April 29, 2005 filing of an answer had no prejudicial effect on the Oltmans. The Oltmans lost their claims on April 18, 2005 because of their inattentiveness. Holland's answer was immaterial. No answer was required before the one year period to sue in the proper forum had elapsed. The Oltmans and WSTLA are blaming Holland America when the fault lies with the Oltmans and their counsel.

To restate, it was impossible for Holland America to file a "late" answer which could have conceivably prejudiced the Oltmans. What Appellants and WSTLA's argument boils down to is that Holland America should be held to some special duty to accelerate an answer to a complaint

earlier than the end of the 20 day period where a plaintiff may be subject to a time related dismissal. They are essentially arguing that a defendant should provide an early alert to a plaintiff when a claim is in jeopardy because of a dispositive affirmative defense. This is simply not a reasonable interpretation of the civil rules and would stand pleading practice on its head. In truth Appellants controlled the material time line in this matter, not Holland America. They waited to the last minute to file a complaint and left themselves no time to correct their error when they found themselves in the wrong forum. No conduct here by Holland America proximately caused prejudice to Appellants as a matter of law. It follows that, consistent with Lybbert, without a showing of prejudice, there can be no viable CR 12 waiver argument in the first instance.

Lastly the Oltmans read enough of the cruise ticket to find the one year time to sue clause but apparently overlooked the forum selection clause which actually comes earlier in the cruise ticket. Any prejudice suffered by the Oltmans was not caused by Holland America's answer but by their own tardiness in filing suit and their concomitant failure to either fully read or understand their cruise ticket.

B. Maritime Law Adheres to Susan Oltman's Claim and Precludes the Application of Washington Law

WSTLA in the face of compelling authority to the contrary argues that Susan's loss of consortium claim is grounded in Washington law and goes further in contending that her claim is not at all cognizable under maritime law. To reach this conclusion, WSTLA takes the Court on an eight-page odyssey ending with a highly strained interpretation of Yamaha Motor Corps., U.S.A. v. Calhoun, 516 U.S. 199 (1996). *See* WSTLA Br. at 12-20. This Court's decision, however, must stand on solid legal ground and must recognize that Susan's claim is governed by federal maritime law which was the decision of the Court of Appeals and the federal district court in the related proceedings. Both the law embodied in Supreme Court precedent and the facts rule out application of Washington law.

WSTLA concedes that Susan Oltman's loss of consortium claim is predicated on an underlying and associated maritime injury claim that occurred at sea. *See* WSTLA Br. at 17-20. Every court that has addressed the question on similar facts has ruled that Susan Oltman's claim falls within the ambit of maritime law.[5] Despite its concession, WSTLA

[5] Maritime law applies when "conditions of both location and of connection with maritime activity" are satisfied. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995). A cruise line's transport of its passengers readily satisfies both prongs of the maritime choice-of-law/jurisdiction tests, as the Ninth Circuit explained in applying maritime law: "A cruise line's treatment of paying passengers clearly has potential to disrupt commercial activity, and certainly has substantial relationship to traditional maritime activity." Wallis v. Princess Cruises, Inc., 306 F.3d

invites the Court to apply Washington loss of consortium law by extending the Yamaha decision beyond state territorial waters onto the high seas. *See* Yamaha, 516 U.S. at 202 (holding that state law may apply to injuries to nonseamen only where suffered in *state territorial waters*). Yamaha clearly holds that state law remedies may supplement the maritime law only where the nonseafarer injury occurs in state territorial waters. Id. No reported decision has extended Yamaha to the high seas no doubt because the analysis in the decision not only permits state law remedies in territorial waters but also precludes those remedies on the high seas. Yamaha and its thorough discussion of precedent and the history of remedies under both state and maritime personal injury law stands as an absolute bar to any extension of state law remedies beyond state waters. In limiting state law remedies to state territorial waters, the decision is binding precedent denying state law remedies on the high seas. Id.

Here WSTLA would have the law of any state where a complaint is filed determine the law to be applied to a loss of consortium claim arising from a high seas injury. This is totally inimical to the principle of uniformity which informs many U. S. Supreme Court and Federal Courts of Appeals decisions applying the maritime law. Shipowners would face suits in 50 states with different loss of consortium rules. State law must

827, 840-31 (9th Cir. 2002) (citing Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972)).

defer to maritime law where the uniformity of maritime law is compromised. The maritime law is well settled. There is no recognized loss of consortium claim arising from a personal injury on the high seas. The Court must thus decline WSTLA's invitation to extend the maritime law in the face of compelling precedent to the contrary.

WSTLA also glosses over the absence of key facts that alone preclude the application of Washington law. There is no evidence in the record to connect the locus of injury to any of the Oltmans to Washington state territorial waters. The cruise never entered Washington waters. It ended in San Diego, California. In fact there is no evidence that the Oltmans at any material time were ever in Washington State. There is simply no factual basis to apply Washington law.

WSTLA also argues that there is some "tension" regarding loss of consortium claims, similar to Susan Oltman's claims, within the maritime law. If so, the tension does not appear in any reported decisions. Instead, the decisions uniformly draw clear lines regarding the substantive law remedies available for passenger injury claims in state territorial waters and on the high seas. If there ever was any tension, it has long been resolved.

The maritime authority with respect to loss of consortium claims on the high seas is simply contrary to Susan Oltman's position and

WSTLA's arguments. *See e.g.* Chan v. Society Expeditions, 39 F.3d 1398 (9th Cir. 1994). In Chan, the court reasoned and then held:

> The Chans argue that we should allow a claim for loss of society or consortium to the dependents of a passenger *injured in an accident at sea* even though such damages are denied the dependents of a passenger killed at sea. This argument makes no sense. To so hold would effectively reward a tortfeasor for killing, rather than merely injuring his victim. *Accordingly, we hold that loss of consortium and loss of society damages are not available in these circumstances under general maritime law. This conclusion best serves the goal of uniformity in remedies in maritime cases that the Supreme Court emphasized in* Miles.

Id. at 1408 (emphasis added) (citing Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990); *see also* Sutton v. Earles, 26 F.3d 903, 915 (9th Cir. 1994) (recognizing that DOHSA and the Jones Act bar claims of loss of consortium that are based on injuries sustained by spouses while on the high seas). Maritime law is uniformly clear in denying Susan Oltman's loss of consortium claim.[6] There is simply no recognized consortium

[6] Post-Yamaha decisions are in agreement that loss of consortium is not recoverable for injuries occurring on the high seas. See, e.g., Paul v. Holland America Line-USA, Inc., 463 F. Supp.2d 1203, 1209 (W.D. Wash. 2006) (holding that loss of consortium claims are not cognizable in cases governed by general maritime law); Frango v. Royal Caribbean Cruises, Ltd., 891 So.2d 1208, 1210-11 (Fla. App. 2005) (denying loss of consortium claim based on Florida law because the injury took place on the high seas and general maritime law precludes such actions); McKenzie v. C. & G. Boat Works, Inc., 322 F. Supp.2d 1330, 1333-34 (S.D. Ala. 2004) (holding that loss of consortium is recoverable under maritime law only in case involving injury to persons in territorial waters); Friedman v. Cunard Line, Ltd., 996 F. Supp. 303, 313 (S.D.N.Y. 1998) (holding "the general maritime law, which governs the case at bar, does not provide plaintiff . . .with a cause of action for loss of society and consortium caused by injury [to his spouse] occurring on the high seas"). The Yamaha decision, as discussed, is not to the contrary

claim under the maritime law because of the U.S Supreme Court Miles decision. It is the cited precedent that courts consistently apply when ruling out loss of consortium claims to both seafarers and non seafarers arising from injury on the high seas.

As expressed in Chan, the bar to a consortium claim serves the Miles principle of uniformity of remedies under the maritime law. Id. at 1408. The Miles and Yamaha decisions simply preclude any application of state law to the Oltmans claims. This includes the loss of consortium claim. This Court must therefore decline to apply Washington or any other state law to claims arising from injury on the high seas.

II. CONCLUSION

WSTLA urges this Court to construe the 20 day time to answer period allowed by CR 12 as an automatic bar to CR 12 defenses including the defense of improper forum. There is no basis in fact or law to find a bar or waiver. Washington case law uniformly holds that an affirmative defense asserted in an answer filed as a first responsive pleading preserves the defense absent extraordinary dilatory and intentionally misleading conduct, which, as WSTLA concedes, is entirely absent here.

Under CR 12, Holland America was not even required to file an answer before bringing its motion. CR 12(b)(3). Holland America could

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because that ruling allowing state law remedies was limited to passenger injuries in territorial waters.

have filed its dismissal motion on April 18, 2005, the 15th day after service of the complaint, without filing an answer and the resultant dismissal judgment would have been the same.

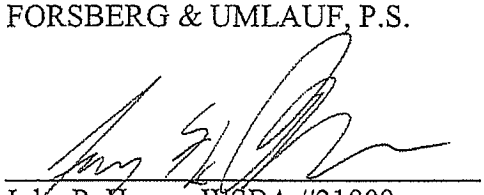
Holland America did answer in its first responsive pleading on the 27th day after service of the complaint and raised the improper venue defense as required by the rule. On the 18th day after service, the Oltmans claims were time barred pursuant to the cruise ticket contract provision. Had Holland America answered within the 20 day period but after the 17th day following service, the claims would have been time barred for failure to timely file in the proper forum. The additional 7 days taken by Holland America to answer were immaterial and caused no prejudice to the Oltmans. By April 18, 2005 they had lost their legal right to timely file a claim in the proper court and no answer to their complaint by Holland America was yet required under CR 12.

WSTLA inexplicably asks this Court to apply Washington law to a suit that is governed by maritime substantive law. U. S. Supreme Court precedent and all maritime law decisions on point hold that maritime law not state law apply to this loss of consortium claim. Certainly Washington law is not applicable. There are no facts suggesting that any injury or act causing injury took place in Washington let alone the state territorial waters of Washington. The Shute, Miles and Yamaha U.S. Supreme

Court decisions and progeny compel application of federal maritime law to all of the Oltmans' claims including the loss of consortium claim. The Court of Appeals decision should be affirmed in all respects.

Respectfully submitted this 15th day of November, 2007.

FORSBERG & UMLAUF, P.S.



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FILED AS ATTACHMENT TO E-MAIL

APPENDIX

C

Elias v. Energy Reduction Systems, Inc.
E.D.Pa.,1993.
Only the Westlaw citation is currently available.

United States District Court,E.D. Pennsylvania.
Gabriel ELIAS, Plaintiff,
v.
ENERGY REDUCTION SYSTEMS, INC. and James E. Henke, Defendants.
No. CIV. A. 92-4971.

March 2, 1993.

MEMORANDUM

INTRODUCTION

*1 Currently pending in this case is defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(2) for lack of jurisdiction over the person (Document No. 6). Subject matter jurisdiction is founded upon a diversity of the parties under 28 U.S.C. § 1332, as the parties are citizens of different states, and the amount in controversy is in excess of $50,000, exclusive of interest and costs. For the reasons which follow, I shall grant the motion, and this action shall, consequently, be dismissed.

BACKGROUND

The complaint contains the following allegations. Plaintiff, Gabriel Elias ("Elias"), is a citizen of the Commonwealth of Pennsylvania, residing in Elkins Park, Pennsylvania. Complaint at ¶ 2. Defendant Energy Reduction Systems, Inc. ("ERS") is alleged to have been an Indiana corporation headquartered in Crane, Indiana during the time of the events in question. *Id.* at ¶ 3. Defendant James Henke (" Henke") is claimed to be the president of ERS and a resident of Indianapolis, Indiana. *Id.* at ¶ 4.

In his First Claim For Relief, plaintiff Elias asserts that ERS has defaulted on an Agreement of Purchase (the "Agreement") that ERS, acting through Henke, entered into with plaintiff's nominee, a person by the name of Bella Angel (" Angel"). Complaint at ¶ 5. Plaintiff alleges that under the Agreement, which was purportedly executed by the defendants on or about October 31, 1984, defendants promised to pay to plaintiff the principal sum of $375,000, with interest at a rate of thirteen percent (13%) per annum. *Id.*[FN1] Pursuant to the alleged default, plaintiff seeks the stated principal amount, interest at the 13% annual rate from October 31, 1984 to the date of judgment, and all costs plaintiff has incurred in enforcing the Agreement. *Id.* at ¶ 7.

In his Second Claim For Relief, plaintiff contends that defendant Henke personally guaranteed payment of the amount due under the Agreement and a related promissory note. Complaint at ¶ 9. It is alleged that notwithstanding plaintiff's demands for payment, Henke has defaulted under the guaranty agreement, failing to pay plaintiff the entire amount of the principal and accrued interest at the time payment was due, or at any time up to the date of the complaint. *Id.* at ¶ 9. As a result, plaintiff requests the same sum it seeks from defendant ERS from defendant Henke as well. *Id.* at ¶ 10.

DISCUSSION

The Standard of Review Under Fed.R.Civ.P. 12(b)(2)

When the defense of lack of personal jurisdiction pursuant to Rule 12(b)(2) has been raised, the plaintiff has the burden to prove facts sufficient to establish personal jurisdiction by a preponderance of the evidence. *Carteret Sav. Bank v. Shushan,* 954 F.2d 141, 146 (3d Cir.) (citing *Time Share Vacation v. Atlantic Resorts, Ltd.,* 735 F.2d 61, 65

(3d Cir.1984)), *cert. denied,*113 S.Ct. 61 (1992). Unlike a Rule 12(b)(6) motion for failure to state a claim, plaintiff may not rely on the bare pleadings alone to withstand a Rule 12(b)(2) motion to dismiss, but must respond with actual proofs, such as sworn affidavits or other competent evidence. *Patterson v. FBI,* 893 F.2d 595, 603 (3d Cir.), *cert. denied,*111 S.Ct. 48 (1990) (citation omitted).

*2 Rule 4(e) of the Federal Rules of Civil Procedure authorizes a district court to exercise personal jurisdiction over foreign defendants to the same extent as that allowed under the so-called long-arm statute of the state in which the district court sits. " 'The Pennsylvania long-arm statute[, 42 Pa. Cons. Stat. Ann. § 5301*et seq.,*] contemplates that a court may exercise in personam jurisdiction on essentially two bases; this statutory framework tracks the two jurisdictional theories defined by the Court in *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).' " *Larami Corp. v. Amron, et al.,* No. 91-6145, 1992 U.S. Dist. LEXIS 8418, at *6-*7 (E.D. Pa. June 11, 1992) (quoting *Strick Corp. v. A.J.F. Warehouse Distrib., Inc.,* 532 F.Supp. 951, 955 (E.D.Pa.1982) (Pollak, J.)).

A plaintiff may establish personal jurisdiction either by suing under a cause of action arising from minimum contacts of the defendant with the forum state (specific jurisdiction), 42 Pa. Cons. Stat. Ann. § 5322, or show that the defendant has "continuous and systematic" contacts with the forum state, in which case the cause of action need not arise from those contacts (general jurisdiction), 42 Pa. Cons. Stat. Ann. § 5301. *Larami Corp.,*1992 U.S. Dist. LEXIS 8418, at *7 (citing *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n,* 819 F.2d 434, 437 (3d Cir.1987)). Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, the exercise of jurisdiction by a court under either theory of personal jurisdiction may " ' not offend traditional notions of fair play and substantial justice.' " *Id.* at *7-*8 (quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)).

Analysis

Defendants argue that plaintiff Elias cannot establish general personal jurisdiction over them, because neither of them have maintained any contacts with Pennsylvania that could be construed as continuous and systematic. They contend that neither of them is a resident of Pennsylvania, nor engaged in business here, that they have never owned property in Pennsylvania, and that they do not have agents or employees in the state. Brief In Support Of Defendants' Motion To Dismiss (" Defendants' Brief") at p. 5.

Defendants also contend that plaintiff cannot invoke specific personal jurisdiction over them, because neither Henke nor ERS has engaged in any activity in Pennsylvania related to the current lawsuit. They contend that all of the documents relating to the assignment of the leasehold interest in the subject Indiana property were executed in Indiana, and that the only payment made under these documents was tendered to the closing agent in Indiana. Defendants' Brief at pp. 5-6. Further, defendants note that all of their activities in performance of the contracts at issue were to occur in Indiana. *Id.*at p. 6. Defendants did nothing, they contend, to cultivate a relationship, business or otherwise, with Pennsylvania. *Id.*

*3 Plaintiff first argues in response that defendants' Rule 12(b)(2) motion is untimely under Rule 12(h)(1), because it was filed approximately sixty-five (65) days after service of the summons and complaint was accomplished, eleven (11) days after the expiration of an extended period in which defendants could file a responsive pleading (plaintiff stipulated to an extension of time for defendants to respond to the complaint until November 2, 1992), and allegedly seven (7) days after defendants were notified that plaintiff intended to seek a default judgment. Plaintiff's Memorandum of Law ("Plaintiff's Memo.") at p. 1.

Before addressing the merits of plaintiff's Rule 12(h) argument, I note that a review of the file in this case shows that although defendants had exceeded the extended stipulated period in which to answer the complaint or otherwise move, they did file a motion, which I granted, requesting more time. Specifically, on November 9, 1992, four (4) days

before the pending motion was filed, defendants filed a motion for an extension of time to answer or otherwise move as to the complaint, seeking an additional thirty (30) days from November 2, 1992, the date the prior stipulation for an extension of time expired. I subsequently granted this motion, giving defendants until December 2, 1992 to file an answer or other response to plaintiff's complaint. *See* Document No. 11.

I will now discuss plaintiff's contention that defendants' Rule 12(b)(2) motion to dismiss is untimely under Rule 12(h)(1). Rule 12(h)(1) states, in pertinent part, as follows:
A defense of lack of jurisdiction over the person ... is waived ... (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Fed.R.Civ.P. 12(h)(1). Plaintiff cites two (2) cases which interpret Rule 12(h)(1) to mean that the time limit for a defendant to move under Rule 12(b) is that specified in Rule 12(a) for a defendant to file an answer, namely twenty (20) days. Plaintiff's Memo. at pp. 1-2 (citing *Granger v. Kemm, Inc.*, 250 F.Supp. 644, 645 (E.D.Pa.1966); *Proose v. Stoltzfus*, 6 Fed. R. Serv.2d (Callaghan) 95 (E.D.Pa.1962)).

More recent authority has criticized and declined to follow this construction of Rule 12(h)(1). For instance, in *Foss v. Klapka*, 95 F.R.D. 521 (E.D.Pa.1982), the court framed the issue before it and its holding as follows:
The question presented to the Court is whether a defendant who asserts a defense of lack of personal jurisdiction in his first response to a complaint waives that defense if this response is not filed within 20 days after service of the complaint. The Court holds that such tardiness does not constitute waiver so long as defendant's first response raises the issue of personal jurisdiction.

Id. at 522. As the court in *Foss* explained, although Rule 12(h)(1) clearly states that a defendant who chooses to answer a complaint on the merits and subsequently files a motion to dismiss for lack of personal jurisdiction will be deemed to have waived this defense, this rule does not state that a waiver will be found if the defendant's motion is untimely. *Id.* at 523. Rule 12(h)(1) simply requires that a defendant's initial response to the complaint raise the jurisdictional defense. *See also*5A C. Wright and A. Miller, *Federal Practice and Procedure* § 1391, at 754 (1990) ("[Rule 12(a)] only deals with when the pleading must be served and is silent on the question of waiver. [Rule 12(h)(1)] does not call for the assertion of the defense within the time provided in Rule 12(a) for serving a responsive pleading; it merely dictates waiver if the defense is not made by motion or included in the responsive pleading, presumably whenever if may happen to be served."). Here, as in *Foss*, this requirement is met, because defendants did not first answer the complaint, but chose instead to file their Rule 12(b)(2) motion to dismiss. *Foss*, 95 F.R.D. at 523.

*4 Although at some point, delay in filing a Rule 12(b) motion may be disruptive of trial proceedings, or prejudicial to a plaintiff,[FN2] I conclude that the Rule 12(b)(2) motion of the defendants here was timely filed. Hence, I shall now address the opposing arguments of the parties on the sufficiency of this Court's personal jurisdiction over the defendants.

Plaintiff cites several factors in an attempt to meet his burden of proving the existence of personal jurisdiction over the defendants in this Court. In this regard, plaintiff states that he negotiated the Agreement from his office in Elkins Park, that all payments under the agreement were to be made to plaintiff at his office, and that the only payment actually made under the Agreement was sent to plaintiff in Pennsylvania. Plaintiff's Supplemental Memo. at p. 4. Furthermore, plaintiff contends, defendants obtained purchase money financing from plaintiff. *Id.*

The foregoing factors are insufficient to establish personal jurisdiction. As defendants note, the promissory note connected with the Agreement, Exhibit A to the Complaint, explicitly states that it was "signed and delivered at Indianapolis, Indiana this 31st day of October, 1984." Defendant's Reply at p. 2. In addition, the documents cited by plaintiff,

including the note requiring the payments now in dispute, were executed for the purchase of real estate located in Indiana.

Moreover, the fact that plaintiff executed the Agreement at his Pennsylvania office is also not an adequate contact upon which to base personal jurisdiction, because personal jurisdiction may not be founded solely on the unilateral actions of a plaintiff; it must be based upon some act by which the defendant purposefully availed itself of the privilege of conducting activities in the forum state. *See, e.g., Time Share Vacation Club v. Atlantic Resorts, Ltd.,* 735 F.2d 61, 65 (3d Cir.1984); *Lynch v. New Jersey Auto. Full Ins. Underwriting Ass'n.,* 762 F.Supp. 101, 104-05 (E.D.Pa.1991). Nor is the fact that payments were made, or would be made, to plaintiff in Pennsylvania a sufficient jurisdictional nexus. *Lynch,* 762 F.Supp. at 104 (neither tendering of payment by one contracting party to another in the forum, nor the placing of telephone calls or the sending of letters into the forum by out-of-state contracting party, constitute sufficient contacts for personal jurisdiction).

I also find unavailing plaintiff's statement that defendants obtained purchase money financing from plaintiff. Plaintiff provides no explanation as to the terms of this financing, and does not discuss how this factor alone may legally support personal jurisdiction. I find plaintiff's general statement about the alleged financing insufficient by itself to buttress his claim of personal jurisdiction. Accordingly, I conclude that plaintiff has not fulfilled his burden of establishing personal jurisdiction over the defendants by a preponderance of the evidence.

CONCLUSION

*5 For the foregoing reasons, I shall grant the motion to dismiss of the defendants. This case shall, therefore, be dismissed.

An appropriate order follows.

ORDER

AND NOW, this 2nd day of March 1993, upon consideration of the motion of the defendants to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction (Document No. 6), and the responses and replies of the parties thereto, and for the reasons stated in the attached memorandum, it is hereby ORDERED that the motion of the defendants is GRANTED, and that the above-captioned lawsuit is hereby DISMISSED for want of personal jurisdiction.

This is a final order.

FN1. In his Supplemental Memorandum of Law ("Plaintiff's Supplemental Memo.") submitted in response to defendants' motion, plaintiff explains that the Agreement covered plaintiff's entire leasehold interest in property in Indiana known as Crane Gardens. Plaintiff's Supplemental Memo. at p. 1.

FN2. *See Michaels, et al. v. Franks, et. al,* No. 90-5039, 1991 U.S. Dist. LEXIS 18708, at *10-*11 (E.D. Pa. Dec. 18, 1991) (Rule 12(b)(2) motion deemed untimely where defendants chose to engage in extensive discovery and appeared before the court for argument on a summary judgment motion).

E.D.Pa.,1993.
Elias v. Energy Reduction Systems, Inc.
Not Reported in F.Supp., 1993 WL 55932 (E.D.Pa.)

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Gordon v. Strictland
E.D.Pa. 1993
Only the Westlaw citation is currently available.
United States District Court,E.D. Pennsylvania.
Marvin GORDON
v.
Francis L. STRICTLAND.
No. CIV. A. 93-3875.

Sept. 24, 1993.
VANARTSDALEN.

MEMORANDUM AND ORDER

*1 On July 20, 1993, plaintiff Marvin Gordon, a citizen of the Commonwealth of Pennsylvania, asserting diversity jurisdiction under 28 U.S.C. § 1332 (1988), filed a complaint in this court seeking what appears to be in excess of $50,000 (Complaint at ¶ 3) for damages and injuries sustained in an automobile accident with defendant Francis L. Strictland, a citizen of South Carolina. The complaint alleges that "[o]n March 31, 1992, plaintiff was operating his motor vehicle on the Delaware Memorial Bridge (Route 40 Eastbound, I-295 Eastbound), Wilmington, Delaware, and while stopped in Toll Plaza Lane # 4, was struck in the rear by the defendant herein causing the injuries and damages more particularly set forth herein." (Complaint at ¶ 4).

It appears that plaintiff served process on defendant on July 26, 1993. On September 10, 1993, defendant filed a motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure Rule 12(b)(3). Plaintiff contends that this motion should be denied because it is untimely under Federal Rule of Civil Procedure 12(a).

The Delaware River and Bay Authority, a joint venture between New Jersey and Delaware, operates the Delaware Memorial Bridge, which spans the Delaware River between New Jersey and Delaware. The alleged motor vehicle accident took place on the Delaware side of the bridge in Wilmington.[FN1]

Section 1391(a) of Title 28 establishes that proper venue for diversity actions in judicial districts exists only in:
(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced.

Under this statute, the Eastern District of Pennsylvania is an improper venue.

Clearly, under the first two bases, venue is improper. First, the defendant resides in South Carolina. Second, the accident occurred in the judicial district of Delaware. Although plaintiff argues that "the Commonwealth of Pennsylvania and the United States Eastern District have a vested interest in the health and welfare of its citizens," (Pl. Resp. to Def. Mot. to Dismiss), this is an insufficient basis to establish proper venue because no events or omissions occurred in Pennsylvania. The last potential basis for venue, however, is more complicated. Venue would be proper if the defendant were subject to personal jurisdiction in the Eastern District of Pennsylvania when the plaintiff filed the action.

"Rule 4(e) of the Federal Rules of Civil Procedure authorizes a district court to assert personal jurisdiction over a non-resident to the extent permissible under the law of the state where the district court sits."*North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 689 (3d Cir.), *cert. denied*,498 U.S. 847 (1990). In this instance, under Pennsylvania's long-arm statute, personal jurisdiction could possibly be premised under 42

Pa. Con. Stat. Ann. § 5322(a)(4) (Supp.1993) by " causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth," or 42 Pa. Con. Stat. Ann. § 5322(b) (1981), which enables the exercise of personal jurisdiction "to the fullest extent possible under the Constitution of the United States."

*2 In *Garzone v. Kelly,* 593 A.2d 1292 (Pa.Super.1991), an automobile accident case in which the plaintiff resided in Pennsylvania, the defendant was a nonresident and the accident took place in a different state, the Pennsylvania Superior Court held that the "accident victim's suffering of residual harm within this state was an insufficient basis to assert specific jurisdiction over a non-resident."*Id.* at 1297-98 (citing *Defay v. McMeekin,* 508 A.2d 324, 326 (Pa.Super.1986)). Plaintiff's present action is factually similar to this recent decision of the Pennsylvania Superior Court; personal jurisdiction, therefore could only be asserted, if at all, under 42 Pa. Con. Stat. Ann. § 5322(b).

Under the Constitution, however, jurisdiction may not be premised under 42 Pa. Con. Stat. Ann. § 5322(b). A state may exercise specific jurisdiction over a defendant when "a controversy is related to or arises out of the contacts defendant purposely established in the forum state," or general jurisdiction when "the defendant has maintained continuous and substantial forum affiliations."*Bane v. Netlink, Inc.,* 925 F.2d 637, 639 (3d Cir.1991). To allow otherwise would offend "traditional notions of fair play and substantial justice" guaranteed by the Due Process Clause of the Fourteenth Amendment. *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). The alleged accident in Delaware clearly does not provide Pennsylvania with specific jurisdiction over defendant because the only connection with the Commonwealth is that the plaintiff is one of its citizens. Additionally, there is no evidence of " continuous and substantial forum affiliations," which would enable the exercise of general jurisdiction. It would be unreasonable to expect defendant to anticipate being haled into court in this district to defend an automobile accident suit that took place in Delaware. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980).

It is quite apparent that a defendant does not submit to the jurisdiction of Pennsylvania merely because he tortiously injures a Pennsylvania citizen in another state. I therefore conclude that venue is improper in this district. Because the alleged accident occurred in Delaware, the United States District Court for the District of Delaware is a proper venue for this action. *See*28 U.S.C. § 1391(a)(2) (stating that venue is proper in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred "). Thus, pursuant to 28 U.S.C. § 1406[FN2] this action will be transferred to the United States District Court for the District of Delaware.[FN3]

An appropriate order follows.

FN1. Without citing any authority, plaintiff asserts that "[a]rguably, the Delaware River and Bay Authority Memorial Bridge is a joint enterprise between Delaware and the Commonwealth of Pennsylvania."(Pl. Resp. to Def. Mot. to Dismiss). After researching the matter, there is no evidence that the Commonwealth of Pennsylvania has any control over or connection with the Delaware River and Bay Authority. Under the known facts, plaintiff's contention is patently inaccurate.

FN2.28 U.S.C. § 1406(a) provides that " [t]he district court of the district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."Clearly, this case could have been brought in the District of Delaware. *See*Del.Code Ann. tit. 10, § 3104(c)(3) (Supp.1992) (providing that a nonresident who "causes tortious injury in the State by an act or omission in this State, " submits himself to the jurisdiction of Delaware courts). It should also be noted that transferring the case to Delaware

should cause limited hardship to plaintiff because plaintiff resides in West Chester, Pennsylvania which is situated in close proximity to the District of Delaware.

FN3. Plaintiff has argued that defendant's motion is untimely because it was not filed within 20 days after service. Although some older decisions have held that a venue objection is waived if it is not asserted within 20 days after the service of process, *see, e.g., Granger v. Kemm, Inc,* 250 F.Supp. 644, 645 (E.D.Pa.1966) (concluding that Rule 12(a)'s requirement that a defendant shall serve an answer within 20 days applies to 12(b) motions), recent decisions have rejected this formalistic approach to Rule 12(b) motions. *See Elias v. Energy Reduction Sys., Inc.,*1993 U.S. Dist. LEXIS 2748, at *9 (E.D. Pa. Mar. 3, 1993) (holding that under a 12(b)(2) motion "tardiness does not constitute a waiver so long as defendant's first response raises the issue"). Under Rule 12(h)(1), "[a] defense of ... improper venue ... is waived (A) if omitted from a motion ... or (B) if it is neither made by motion under this rule nor included in a responsive pleading."Rule 12(b) only requires that "[a] motion making any of these defenses shall be made before pleading."Therefore, unless a plaintiff has made a motion for default, a defendant's motion to dismiss for improper venue after the 20 day period is timely if the defendant has not yet responded. In this instance, plaintiff has made no motion for default and defendant's motion to dismiss for improper venue is defendant's first responsive pleading. As a result, I conclude that defendant has filed a timely motion. *See Aetna Life Ins. Co. v. Alla Medical Servs., Inc.,* 855 F.2d 1470, 1474 (9th Cir.1988) (concluding that "[t]his circuit allows a motion under 12(b) any time before the responsive pleading is filed. ").*See also*5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1391, at 753-54 (2d ed.1990).

E.D.Pa. 1993
Gordon v. Strictland
Not Reported in F.Supp., 1993 WL 386765 (E.D.Pa.)

END OF DOCUMENT

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Kampf v. Heinecke
E.D.Pa. 1995
Only the Westlaw citation is currently available.
United States District Court,E.D. Pennsylvania.
Ruth A. KAMPF, et al. Plaintiffs,
v.
Raymond HEINECKE, et al. Defendants.
Civ. A. No. 94-6452.

April 28, 1995.

William J. Benz, Southampton, PA, for plaintiff.
JOHN F. LEDWITH, Labrum and Doak, Philadelhia, PA, for defendant.

MEMORANDUM

MCGLYNN, District Judge.

***1** Before the court is Defendants' Motion to Dismiss for Lack of Personal Jurisdiction and for Improper Venue or, in the alternative, to Transfer to the United States District Court for the District of New Jersey. For the following reasons the Motion to Dismiss will be denied and the Motion to Transfer will be granted.

Invoking the diversity jurisdiction of this court, Plaintiffs, citizens of Pennsylvania, brought this action against two citizens of New Jersey for personal injuries sustained at Defendants' New Jersey home.

Plaintiffs contend that Defendants waived objections to personal jurisdiction or to venue because the objections were not made within 20 days of the filing of the complaint. Plaintiffs also oppose the transfer.

The privilege to challenge venue must be " seasonably asserted" or it will be waived. *Commercial Cas. Ins. Co. v. Consolidated Stone Co.,* 278 U.S. 177, 179-80 (1929); *see also Hoffmann v. Blaski,* 363 U.S. 335, 343 (1960). The defense "must be asserted at latest before the expiration of the period allotted for entering a general appearance and challenging the merits."*Id.*

Plaintiffs argue that since an answer under Fed. R. Civ. P. 12(a) is required within 20 days after service of a complaint, the defenses of lack of personal jurisdiction and lack of venue must be made either in the answer or by motion within this 20 day period. *See Zelson v. Thomforde,* 412 F.2d 56, 59 (3d Cir. 1969) (defense of lack of personal jurisdiction is waived by defendant's appearance and by expiration of time limits); *Orange Theatre Corp. v. Rayherstz Amusement Corp.,* 130 F.2d 185, 187 (3d Cir. 1942) (permission to plead within discretion of trial judge when defendants failed to plead or otherwise defend within 20 days allotted by Rule 12(a) and when there was no entry of default); *Granger v. Kemm, Inc.,* 250 F.Supp 644, 645 (E.D. Pa. 1966) (defendants waived right to object to venue when motion was filed 55 days after service of complaint).

Recently, courts have applied a less strict interpretation of the time frame in which to plead a jurisdictional defense. *See Aetna Life Ins. Co. v. Alla Medical Servs., Inc.,* 855 F.2d 1470, 1474 (9th Cir. 1988); *Bechtel v. Liberty Nat. Bank,* 534 F.2d 1335, 1341 (9th Cir. 1976); *Foss v. Klapka,* 95 F.R.D. 521, 522 (E.D. Pa. 1982); Gordon v. Strickland, No. 93-3875, 1993 WL 386765 (E.D. Pa. Sept. 23, 1993); and Elias v. Energy Reduction Systems, Inc., No. 92-4971, 1993 WL 55932 (E.D. Pa. Mar. 2, 1993); 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* §1391 (2d ed. 1990). In *Foss* the court held that the failure of a defendant to assert a defense of lack of personal jurisdiction within 20 days after service of the complaint does not constitute waiver of the defense. 95 F.R.D. at 522. The defendant, however, must raise the defense within the first response to the complaint.*Id.*

Defendants' first response to the complaint is the

present motion which was filed on January 18, 1995, 62 days after service was made on November 17, 1994. Plaintiffs, however, did not file a motion for default judgment until February 3, 1995.[FN1] When a party fails to answer or otherwise plead within 20 days of service of the complaint, the court has discretion to allow an untimely response in the absence of a motion for default judgment. *Orange Theatre Corp.,* 130 F.2d at 187;*see also*Gordon v. Strickland, No. 93-3875, 1993 WL 386765 at *2 (E.D. Pa. Sept. 23, 1993) ("[U]nless a plaintiff has made a motion for default, a defendant's motion to dismiss for improper venue after the 20 day period is timely if the defendant has not yet responded.") In light of Plaintiffs' failure to move for default before Defendants filed the instant motion, Defendants' objections grounded on the lack of personal jurisdiction and improper venue are deemed timely.

***2** Federal Rule of Civil Procedure 4(e) authorizes personal jurisdiction over a non-resident defendant to the extent permissible under the law of the forum state. *Mellon Bank PSFS, Nat. Ass'n v. Farino,* 960 F.2d 1217 (3d Cir. 1992); 42 Pa. Cons. Stat. Ann. § 5322 (West 1981 & Supp. 1992).[FN2]

The due process clause of the fourteenth amendment to the U.S. Constitution limits the reach of a long-arm statute. The effect is that a court may not exercise personal jurisdiction over a non-resident defendant unless there are certain minimum contacts between the defendant and the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980); *Provident Nat. Bank v. California Fed. Sav. & Loan Ass'n,* 819 F.2d 434, 436-37 (3d Cir. 1987). The Supreme Court has held that due process allows a forum to exert personal jurisdiction over a non-resident defendant in two situations. The first situation -- commonly referred to as "specific jurisdiction" -- occurs when the controversy is related to or arises out of the contacts that the defendant purposefully established in the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall,* 466 U.S. 408, 414 (1984). The second situation -- commonly referred to as "general jurisdiction" -- occurs when the defendant has maintained continuous and substantial forum affiliation, whether or not the cause of action is related to those affiliations. *Helicopteros,* 466 U.S. at 414-16.

Once a defendant raises a jurisdictional defense, the plaintiff must establish with reasonable particularity that jurisdiction exists. *Provident Nat. Bank,* 819 F.2d at 437. "To meet this burden, the plaintiff must establish either that the particular cause of action sued upon arose from the defendant's activities within the forum state ('specific jurisdiction') or that the defendant has 'continuous and systematic' contacts with the forum state ('general jurisdiction')."*Id.*(quoting *Helicopteros,* 466 U.S. at 414). Here, Plaintiffs simply argue that defendants waived the objection to personal jurisdiction and, thus, fail to carry their burden of establishing either specific or general jurisdiction.

In objecting to the transfer of the case pursuant to 28 U.S.C. § 1404(a), Plaintiffs argue that the medical treatment occurred in Pennsylvania and that the therapy is ongoing in this forum. This argument, however, fails to satisfy Plaintiffs' burden of establishing specific or general jurisdiction. Rather than dismiss the case outright, however, the court will determine if the case should be transferred to the District of New Jersey.[FN3]

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."28 U.S.C. § 1404(a). Even though personal jurisdiction is lacking, this court has the power to transfer the case to a district in which the case could have been brought originally. *Gehling v. St. George's School of Medicine, Ltd.,* 773 F.2d 539, 544 (3d Cir. 1985) . This is so even if the applicable statute of limitations has run. *Goldlawr, Inc. v. Heiman,* 369 U.S. 463, 467 (1962). Change of venue requires the court to make a two-step analysis. *See Edwards v. Texaco Inc.,* 702 F.Supp 101, 101-02 (E.D. Pa. 1988); Reimer-Young v. Tri-Corp. Amusements, 93-4445, 1994 WL 27309 at *1 (E.D. Pa. Feb. 2, 1994). First, the court must determine if venue is proper in the district where the transfer is sought, and second, the court must determine if the transfer would be in the interest of justice and for the convenience of the parties and the witnesses.

Reimer-Young, at *1-2.

*3 This case could have been brought in the District of New Jersey: the parties are diverse; the amount in controversy is over $50,000; and Defendants reside in the District of New Jersey. Therefore, the first step in the change of venue analysis is satisfied. 28 U.S.C. § 1391(a).

Under the second step, the court must determine if the transfer would be in the interest of justice and for the convenience of the parties and witnesses. This requires a balancing of the following factors:
(1) the plaintiff's choice of forum;
(2) the relative ease of access to sources of proof;
(3) the availability of compulsory process for attendance of unwilling witnesses and cost of attendance of willing witnesses;
(4) the possibility of viewing the premises, if necessary;
(5) all other practical problems that make trial of a case easy, expeditious and inexpensive; and
(6) factors of public interest, including the relationship of the community which the courts and jurors are required to serve to the occurrences that give rise to the litigation.

Reimer-Young v. Tri-Corp. Amusements, 93-4445, 1994 WL 27309 (E.D. Pa. Feb. 2, 1994) at *2 (citing *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508-509 (1947)).

Generally, a plaintiff's choice of forum is of " paramount consideration" and "should not be lightly disturbed." *See Schutte v. Armco Steel Corp.,* 431 F.2d 22, 25 (3d Cir. 1970), *cert. denied,*401 U.S. 910 (1971); *and*Conner v. Bouchard Transp. Co., 93-450, 1993 W.L. 388274 (E.D. Pa. Sept. 30, 1993). Such a choice, however, is entitled to less weight if none of the operative facts occurred in the forum. *Edwards,* 702 F.Supp at 103;*Schmidt v. Leader Dogs for the Blind, Inc.,* 544 F.Supp 42, 47 (E.D. Pa. 1982). Here, the defendants are New Jersey residents and the injury occurred at Defendants' home in New Jersey. Moreover, the court lacks personal jurisdiction over Defendants. As such, Plaintiffs' choice of forum is entitled to less deference.

The following factors weigh in favor of transfer to the District of New Jersey sitting in Camden: (1) the sources of proof are equally accessible in the transferee district; (2) the transfer would cause no real inconvenience to the parties and witnesses; (3) the trier of fact can visit the premises with ease; (4) the transfer cures the jurisdictional defects raised by Defendants; and (5) the citizens of New Jersey have a higher duty to ensure the fair outcome of the dispute because the facts giving rise to the litigation occurred in that forum. *Gulf Oil Corp.,* 330 U.S. at 508-09.

Conclusion

For the foregoing reasons the motion to dismiss will be denied and the motion transfer to the United States District Court for the District of New Jersey will be granted.

ORDER

And now, this 27th day of April, 1995, upon consideration of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2)-(3), or in the alternative to Transfer pursuant to 28 U.S.C. § 1404(a), and the responses thereto, it is hereby

ORDERED

*4 that the Motion to Dismiss is DENIED and the Motion to Transfer is GRANTED. This action is hereby transferred to the United States District Court for the District of New Jersey.

FN1. Plaintiffs attempt to show that the parties entered into a stipulation extending the answer period by 30 days. Since this stipulation was not approved by the court or the clerk of the court, it has no effect. E.D. Pa. Local R. 17.

FN2. Pennsylvania's long-arm statute, 42 Pa. Cons. Stat. Ann. § 5322, provides in pertinent part that:

> (a) General rule -- A tribunal of this Commonwealth may exercise personal jurisdiction over a person ... who acts directly or by an agent, as to a cause of action or other matter arising from such person:
>
> (3) Causing harm or tortious injury by an act or omission in this Commonwealth.
> (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.
>
> (b) Exercise of full constitutional power over nonresidents. -- In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.
>
> FN3. Since personal jurisdiction is lacking the court need not address the objection of improper venue. It is noted that Plaintiffs did not respond to the objection of improper venue except to argue that Defendants waived any such right to object. Plaintiffs, however, oppose the transfer to the District of New Jersey.

E.D.Pa. 1995
Kampf v. Heinecke
Not Reported in F.Supp., 1995 WL 262526 (E.D.Pa.)

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Frango v. Royal Caribbean Cruises, Ltd.
Fla.App. 3 Dist.,2005.

District Court of Appeal of Florida,Third District.
Iris FRANGO and Joseph Frango, Appellants,
v.
ROYAL CARIBBEAN CRUISES, LTD., Appellee.
No. 3D03-3261.

Feb. 2, 2005.

Background: Passenger of cruise ship brought negligence action against cruise line for injuries passenger received when automatic sliding doors on ship closed on passenger's face, and passenger's husband brought claim for loss of consortium. The Circuit Court, Miami-Dade County, granted summary judgment for cruise line. Passenger and husband appealed.

Holdings: The District Court of Appeal, Ramirez, J., held that:

(1) disputed issue of material fact as to extent of passenger's responsibility for injuries she received precluded entry of summary judgment for cruise line in passenger's negligence action, and

(2) husband could not maintain state law loss of consortium claim.

Affirmed in part, reversed and remanded in part.
West Headnotes
[1] Judgment 228 ⚿185.3(21)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185.3 Evidence and Affidavits in Particular Cases
228k185.3(21) k. Torts. Most Cited Cases
Disputed issue of material fact as to extent of passenger's responsibility for injuries she received when automatic sliding doors on cruise ship closed on passenger's face precluded entry of summary judgment for cruise line in passenger's negligence action; passenger briefly stopped in doorway to look back at her husband, but there was evidence that sensor that operated automatic doors could lose person if person remained stationary for moment just prior to entryway of doors.

[2] Shipping 354 ⚿166(1)

354 Shipping
354VIII Carriage of Passengers
354k166 Personal Injuries
354k166(1) k. Care Required and Liability in General. Most Cited Cases
Under general maritime law, cruise line owed cruise ship passengers duty of exercising reasonable care under circumstances.

[3] Husband and Wife 205 ⚿209(3)

205 Husband and Wife
205VI Actions
205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(3) k. Personal Injuries to Wife Resulting in Loss of Services or Consortium, Impairment of Earning Capacity, or Expenses. Most Cited Cases
Federal maritime law would not recognize claim of loss of consortium to non-seaman, and thus husband could not maintain state law loss of consortium claim based on injuries wife received while she was passenger on cruise ship.

[4] Admiralty 16 ⚿1.20(1)

16 Admiralty

16I Jurisdiction
16k1.10 What Law Governs
16k1.20 Effect of State Laws
16k1.20(1) k. In General. Most Cited Cases
State court may apply state law to maritime action so long as there is no conflict with federal maritime law.

[5] Husband and Wife 205 ⇐209(3)

205 Husband and Wife
205VI Actions
205k206 Rights of Action by Husband or Wife or Both
205k209 For Torts
205k209(3) k. Personal Injuries to Wife Resulting in Loss of Services or Consortium, Impairment of Earning Capacity, or Expenses. Most Cited Cases
General maritime law does not allow claims for loss of consortium to non-seamen.

[6] Admiralty 16 ⇐1(1)

16 Admiralty
16I Jurisdiction
16k1 Nature, Grounds, and Scope in General
16k1(1) k. Jurisdiction in General. Most Cited Cases
One of aims of maritime law is to promote uniformity in exercise of admiralty jurisdiction.

***1209** Sarnoff & Bayer, Miami, for appellants.
Rodriguez, Aronson & Essington, and Domingo Rodriguez, Miami, and Andre M. Picciurro, for appellee.

Before GREEN, FLETCHER, and RAMIREZ, JJ.
RAMIREZ, J.
Iris and Joseph Frango appeal the entry of two adverse final summary judgments. We reverse the summary judgment for Royal Caribbean Cruises, Ltd. ("RCCL") on Iris Frango's claim for injuries, but affirm the summary judgment for RCCL on Joseph Frango's claim for loss of consortium.

On November 15, 2001, the Frangos boarded appellee RCCL's SS Galaxy in San Juan, Puerto Rico. While the ship was on the high seas, the automatic sliding doors that lead into the ship's lounge closed on Iris Frango's face. This incident occurred during the early evening hours as Iris Frango entered the lounge and turned her head around to find her husband, who was walking behind her. The doors broke her nose and caused other injuries to her face. The Frangos sued RCCL for negligence.

***1210** Pandelis Kordonis, RCCL's Chief electronic engineer, testified that on one occasion, his assistant stood very close to the closed doors to talk to him and the doors failed to sense his assistant's presence. He also testified that when the doors sense a line of people, the doors will remain open all of the time. However, if a person remained stationary for a moment just prior to the entryway of the doors, the sensor could lose that person. The person could then walk directly into the doors.

Mark A. Young, an architectural civil engineer, inspected and tested the automatic doors and opined that the sensors and doors were not properly installed and maintained. He found that the sensor was missing a lens cover which could have allowed the doors to remain closed. He also opined that RCCL could have executed measures to prevent the incident from occurring through the installation of emergency switches which could have allowed the doors to remain open in anticipation of a steady flow of passengers.

RCCL subsequently moved for summary judgment against Joseph Frango's loss of consortium claim. RCCL argued that general maritime law did not recognize loss of consortium claims for the spouses of passengers who are injured while on the high seas. The trial court granted summary judgment in favor of RCCL.

RCCL also moved for final summary judgment against Iris Frango's claim. RCCL argued that Iris Frango was the sole and proximate cause of her injuries. The trial court granted RCCL's motion finding that Iris Frango was 100% at fault for her injuries. The trial court denied the Frangos' motion for rehearing and entered final judgment as against

both Iris and Joseph Frango.

[1][2] Under general maritime law, RCCL owed the Frangos the duty of exercising reasonable care under the circumstances. *See Kermarec v. Compagnie General Transatlantique,* 358 U.S. 625, 632, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959). As in *Corona v. Costa Crociere S.P.A.,* 844 So.2d 652, 653 (Fla. 3d DCA 2003), "[b]ased on the record now before us, we conclude that the defendant cruise line has not carried its burden of demonstrating the nonexistence of any disputed issue of material fact." We cannot agree that by briefly stopping to look back at her husband, Iris Frango was entirely responsible for the accident.

[3][4] As to the loss of consortium, we have previously stated in *Norwegian Cruise Lines, Ltd. v. Zareno,* 712 So.2d 791, 793 (Fla. 3d DCA 1998) that a state court may apply state law to a maritime action so long as there is no conflict with federal maritime law. Florida law recognizes a claim for loss of consortium, so the issue is whether it would conflict with federal maritime law. We conclude that it would.

[5] In the case of *In re Amtrack "Sunset Ltd." Train Crash in Bayou Canot, Ala., on Sept. 22, 1993,* 121 F.3d 1421 (11th Cir.1997), the court stated that general maritime law does not allow claims for loss of consortium to non-seamen. The court first held that the district court erred in finding that Alabama's wrongful death statute governed the wrongful death claims asserted in this action; it concluded that the federal maritime interests outweighed Alabama's interests in having its wrongful death statute apply to the case. *Id.* at 1427. The court also held that the district court erred in finding that personal injury plaintiffs could seek nonpecuniary damages under the general maritime law for loss of society, loss of consortium, and punitive damages. *Id.* at 1428. "Unless or until the United States Supreme Court should decide to add state remedies to the ***1211** admiralty remedies for personal injury, personal injury claimants have no claim for nonpecuniary damages...."*Id.* at 1429. The court relied on *Lollie v. Brown Marine Serv., Inc.,* 995 F.2d 1565 (11th Cir.1993), which held that "neither the Jones Act nor general maritime law authorizes recovery for loss of society or consortium in personal injury cases." *Id.* at 1565.

Although there is authority to the contrary, such as *Wartman v. Commodore Cruise Line, Ltd.,* 1996 WL 47964, 100 F.3d 943 (2d Cir. Feb.6, 1996), and *Sutton v. Earles,* 26 F.3d 903 (9th Cir.1994), the greater weight of authority seems clearly slanted against authorizing any recovery for loss of consortium. We find the reasoning in *Chan v. Society Expeditions, Inc.,* 39 F.3d 1398 (9th Cir.1994) persuasive. The *Chan* court noted that the spouse of a non-seaman who is killed on the high seas would be unable to recover loss of consortium under the Death on the High Seas Act, 46 U.S.C. § 761 et seq. *Id.* at 1407. It reasoned that it would be absurd to allow such a claim to the spouse of a passenger who is merely injured because such a rule would reward killing, rather than merely injuring, a passenger on the high seas. *Id.* at 1408.

[6] We find that one of the aims of maritime law is to promote uniformity in the exercise of admiralty jurisdiction. *See Moragne v. States Marine Lines, Inc.,* 398 U.S. 375, 386-88, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970). This aim is best advanced by following the majority rule and denying loss of consortium to a passenger's husband, such as Mr. Frango. We thus affirm the summary judgment entered in RCCL's favor on this claim.

Affirmed in part; reversed in part and remanded.

Fla.App. 3 Dist.,2005.
Frango v. Royal Caribbean Cruises, Ltd.
891 So.2d 1208, 2005 A.M.C. 804, 30 Fla. L. Weekly D320

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RE: Oltman v. Holland America Line, et al.
King County Cause No.: 05-2-10552-6 SEA
Court of Appeals Cause No.: 56873-6
Supreme Court No. 79529-1
Our File: 945.0067

Dear Clerk of the Court:

Attached for filing in the above-referenced court file is "Holland America Line, Inc.'s Response to Amicus Curiae Brief of Washington State Trial Lawyers Association Foundation" along with a Certificate of Service.

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